

chaser until the amounts paid total the stipulated purchase price. There is no danger of the village losing its title and right to operate the whole system because of foreclosure as there is under the "mortgage bond" method of financing the transaction. True, the receipts on the operation of the entire system are pledged under that particular plan for the payments to be made before acquiring legal title, but were the village to fail in making sufficient payments to acquire legal title, it would still retain that part of the system originally owned by it.

Besides these distinctions between the two methods there is another. The "conditional sale" plan is simple in operation and effect, while the "mortgage bond" method is cumbersome and its effect may be more disastrous on the municipality's rights in the system. A "conditional sale" involves only the making of a contract, the recording of same, the payment of installments when due, title automatically passing to the purchaser when the last payment is made. To finance by means of "mortgage bonds," it is necessary that a suitable market be found for them, that payments on the bonds be made to divers persons if the seller is indisposed to purchase the bonds or take them as security for payment. There is a possibility that under such a method the village may have to deal with many parties, while the entire transaction under the "conditional sale" plan involves only purchaser and seller. Surely it was not the intention of the people to give municipalities the authority to finance purchases by issuance of "mortgage bonds" and deprive them of the power of purchasing the equipment by a much more desirable method, the "conditional sale" method. That such was their intention becomes even more improbable upon the realization that the sole objection to the "conditional sale pledge of receipts" plan is based upon a conclusion arrived at by technical reasoning, that a transaction under that plan would constitute a lending of credit by the municipality. Add to this, the fact that under the "mortgage bond" method there is an extension of credit to a much greater degree than possible under the "pledge of receipts" plan, and one is led to the conclusion that the broad powers granted to municipalities in regard to utility services includes the authority to purchase equipment under the plan involved in the principal case.

JAMES R. TRITSCHLER

USE OF THE INJUNCTION TO PROTECT RIGHTS OF PERSONALITY*

The recent case of *Tate v. Eidelman* 32 O. N. P (N.S.) 478 (decided in Common Pleas Court of Mahoning County September 21, 1934), in which Plaintiff sought to restrain an infringement of his civil rights, presents again the question of whether or not the court of equity has the power to protect rights of personality by an injunction—an oft-recurring problem that the courts have not adequately solved. Plaintiff sought an injunction restraining the defendant restaurateur from refusing, solely on account of race and color, to serve him and other citizens. Although the court intimated that it was dissatisfied and would favor the extension of the use of the injunction,

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it refused to grant it, feeling itself bound by the authority of *Snedaker v. King*, 111 Ohio St. 225, 145 N.E. 15 (1924). In that case the Supreme Court of Ohio was called upon to enjoin perpetually an insolvent defendant from alienating the affections of the plaintiff's husband and from communicating with him in any manner whatsoever. The court, two judges dissenting, refused to grant the injunction because there was no property right involved. Allen, J., voted with the majority but wrote a concurring opinion in which she expressed the view that the practical impossibility of enforcing the injunction warranted its refusal. Marshall, C. J., dissented, taking the view that equitable jurisdiction would lie in cases not involving a property right. Day, J., concurred in stating that the equitable power existed, adding the qualification that it should rarely be exercised.

Despite the authority favoring *Snedaker v. King supra*, there is a large volume of scholarly and judicial opinion supporting the view of the dissenting judges in holding that the doctrine that courts of equity have no jurisdiction to protect personality where there are no property rights involved, is unsound in principle and unsupported by authority. Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 Harvard Law Review 640. Joseph Long, *Equitable Jurisdiction to Protect Personal Rights*, 33 Yale Law Journal 115. An examination of a number of cases following this view shows four methods in which the problem is being handled by the courts, making it evident that the jurisdiction of equity is not confined to property rights alone but extends also to the protection of personal rights.

First, cases where the courts have completely abandoned the doctrine that a property right is an essential prerequisite to the exercise of equitable jurisdiction. The principle is followed in *Ex parte Warfield*, 40 Tex. Crim. Rep. 413, 50 S. W. 933, 76 Am. St. Rep. 724 (1899), in which the court enjoined the defendant from alienating the affections of plaintiff's wife. The decision was somewhat influenced by the court's construction of a statute, Art. 2989 Rev. Stat., as giving a wider power of granting injunctions than that possessed by the court under the general equity doctrine. However, in *Hall v. Smith*, 80 Misc. 85, 140 N.Y.S. 796 (1913), equity protected a wife's right to the affection and consortium of her husband where no statute was involved, the court citing *Ex parte Warfield* as authority.

Second, cases where the court found a property right involved but by forceful dicta asserted that it would have taken jurisdiction had there been present solely the right of personality. *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 Atl. 97, 14 L.R.A. (N.S.) 304 (1907), in which the court upheld the domestic rights of a person in cancelling a false birth certificate which asserted that plaintiff was the father of the child. *Stark v. Hamilton*, 149 Ga. 227, 99 S.E. 861, 5 A.L.R. 1041 (1919), was a suit by a father to enjoin a man who had debauched his minor daughter and induced her to abandon her parental abode and live with him "in a state of adultery and fornication." Equity enjoined the man from associating and communicating with the girl in any manner whatsoever.

Third, cases where the court waived or did not refer to the question of jurisdiction of equity to protect personal rights, but nevertheless proceeded to protect them. *Kirk v. Wyman*, 83 S.C. 372, 65 S.E. 387, 33 L.R.A.

(N.S.) 1188 (1909), where plaintiff was affected with a disease and it appeared that quarantine in her own home would afford complete protection to the public until a comfortable place could be prepared for her elsewhere, equity restrained the sheriff from putting her into a pest house as it would endanger her life and health. Another striking case is *Mickle v. Henricks*, 262 F. 687 (1918), in which the United States District Court for Nevada enjoined the enforcement of a statute giving defendant warden the right to operate on plaintiff and deprive him of the power of procreation, because he had been found guilty of rape. *Witte v. Bauderer*, 255 S. W. (Texas Civ. App.) 1016 (1923), preserved a domestic relation by restraining an employer from associating with, calling on, or having anything to do with plaintiff's wife, except as related to her duties as employee of defendant. (Directly contra to *Snedaker v. King*, *supra*.)

Fourth, cases holding the right to privacy a proper subject of equitable protection. In *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499, 112 Am. St. Rep. 272, L.R.A. (N.S.) 1147 (1906), and in *Schulman v. Whitaker*, 115 La. 628, 39 So. 737, (1906), the right of privacy was protected by restraining the placing of plaintiff's photographs in the rogue's gallery. To protect the right of privacy the court granted an injunction in *Marks v. Jaffa*, 6 Misc. 290, 26 N.Y.S. 908 (1893), enjoining a newspaper from publishing plaintiff's picture for the purpose of inviting votes to test his popularity in comparison with another person. That the right to privacy was a proper subject of equitable protection was also supported in *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68, 106 Am. St. Rep. 104, 69 L.R.A. 101 (1904). The contra view of the New York court in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442, 59 L.R.A. 478, 89 Am. St. Rep. 828 (1902), has since been modified by statute. Laws N.Y., 1903, p. 309, chapt. 132, 8 Mc Kinney's Laws of New York, sec. 50, 51.

From an examination of the foregoing cases it must appear clear that while the decisions reveal four methods of approach to the question, in reality, there are but two lines of authority. Some courts frankly admit that no property right is essential to equitable interference; others strain the facts to find some tenuous property peg on which to hang their jurisdiction. True, the subject of equitable protection of the rights of personality is beset with inherent difficulties. It is submitted, however, that as the lesser of two evils, a progressive step in the abolition of the technical restriction of a property right should be taken. Though the courts quote Lord Eldon in *Gee v. Pritchard*, 2 Swans. 402, 36 Eng. Rep. 670 (1818), they have taken his words alone and have overlooked his spirit. In that case Lord Eldon gave relief to protect rights of personality though he based his jurisdiction on the existence of a property right. Eldon wanted to break away from the restrictions that the law put on the remedy to protect personality. While he gave lip service to the doctrine of necessity of property rights, he extended the protection of personality by finding the existence of a property right where it had never been contemplated. Just as in another branch of equity, in *Lane v. Newdigate*, 10 Ves. 192, 32 Eng. Rep. 818 (1804), Lord Eldon, while following the due form to which the bar and courts were accustomed, yet in fact extended equity's jurisdiction. Perhaps this might tend toward

making equity vary with the length of the chancellor's foot, nevertheless it would seem that it must result in more good than harm. Cases involving the rights of personality should stand on their own merits. Where it would be more equitable to grant an injunction such should be done; where it would be more equitable to refuse the injunction, that course should be followed. This would involve a balancing of the equities as is now done in cases dealing with equitable protection against trespass and nuisance. Surely, there are few who would say either that in such cases equity has overstepped its jurisdiction or that the results have been anything but desirable. By allowing the injunction to be granted at the discretion of the chancellor, the most deserving parties have their rights upheld. It is submitted that a like application should be extended to the field of protection to rights of personality.

It is not sought herein to champion the cause of either of the parties in *Tate v Eidelman*. The adoption of the suggested step would not guarantee a reversal of the opinion of the lower court, such adjudication depending on the equities involved. However, the case would be judged on its own merits, the bill standing or falling on the equities to be protected, weighed in the scales of the chancellor's discretion, instead of being measured by the technical yardstick of a property right.

MAURICE A. YOUNG

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